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EDITORIAL

DNA and Suspicionless Searches

By The Editorial Board

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Alonzo Jay King Jr. was arrested in Maryland on assault charges in 2009. When he was booked into jail, the police took a sample of his DNA by swabbing the inside of his cheek without a warrant to collect his DNA or probable cause to think it would link him to any crime. His DNA profile matched evidence from a rape in 2003, and he was convicted of that rape.

Maryland's highest court last year wisely struck down the state law that permits DNA collection from people who have been charged but not yet convicted because it violates the Fourth Amendment prohibition against unreasonable searches.

On Monday, the Supreme Court, in a 5-to-4 decision, overturned that ruling and upheld the Maryland law.

Justice Anthony Kennedy, writing for the majority, pretended that collecting DNA is like fingerprinting, a legitimate part of the police booking procedure to identify a suspect.

But the main reason law enforcement seeks DNA sampling is not to get an accurate name. It is to connect the suspect to other cases, unrelated to the arrest, by matching the DNA found at other, older crime scenes, when there is no reasonable suspicion to do so.

That is exactly the use of DNA that Justice Samuel Alito Jr. alluded to during oral argument in February when he called this "perhaps the most important criminal procedure case that this court has heard in decades" — because the use of DNA could help in investigating unsolved crimes with "a very minimal intrusion on personal privacy."

The federal government and 28 states currently permit DNA collection before conviction. The decision severely undermines fundamental Fourth Amendment principles that protect individuals against unjustified searches and incursions on privacy by law enforcement.

Justice Antonin Scalia, writing the dissent that was joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan, eviscerated the logic of the majority opinion.

"The court's assertion that DNA is being taken, not to solve crimes, but to *identify* those in the state's custody, taxes the credulity of the credulous," he said. "Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches."

That has been a bedrock rule in court decisions about the Fourth Amendment, Justice Scalia explained, which the majority has cast aside. Until now, the Supreme Court has allowed suspicionless searches — also called "special needs" searches by the court — only when there is some justification other than discovering evidence of criminal wrongdoing.

For example, the court has approved such searches in the form of random drug tests of railroad employees to ensure safety of the railroads.

In this case, there was neither a basis for suspicion nor a special need. "This search had nothing to do with establishing King's identity," Justice Scalia wrote, warning that "as an entirely predictable consequence of today's decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason."

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